

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENJAMIN ADAMS,

Plaintiff,

No. CIV S-04-2474 MCE GGH P

vs.

TERESA SCHWARTZ , et al.,

Defendant.

FINDINGS AND RECOMMENDATIONS,

Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is defendant's motion for summary judgment, or, in the alternative, summary adjudication of issues, filed on July 20, 2007, to which plaintiff filed an opposition, after which defendant filed a reply.

Allegations

In his amended complaint, plaintiff names Correctional Officer (C/O) Brida, employed at California Medical Facility -Vacaville (CMF-Vac), as the defendant. Plaintiff states that defendant Brida, the correctional officer (C/O) assigned to wing H2 where plaintiff is housed, is responsible for making sure that porters assigned to clean and mop the floors put caution signs out at all times when the floors are wet from being mopped. First Amended

1 Complaint (FAC), p. 2. Plaintiff alleges that defendant Brida failed to instruct the porters to
2 fulfill their assigned duties for the entire period of time that he was the assigned wing officer in
3 H2. Id.

4 On or about April 14, 2004, defendant Brida refused to perform his duties by
5 failing to instruct the porters to place caution signs out while the floor was wet. FAC, p. 2. As a
6 result, plaintiff slipped and fell, cracking his tailbone, injuring his back, kidneys, neck and head,
7 and suffering severe pain. Id. Defendant Brida continues to refuse to enforce the rules regarding
8 caution signs when floors are being mopped in H2 wing. Id.

9 Plaintiff has been provided a cervical collar by non-defendant Dr. Low to try to
10 ease plaintiff's neck pain. FAC, p. 2, 8. Plaintiff includes exhibits to his amended complaint
11 which he avers demonstrate that three facility doctors have confirmed that plaintiff has sustained
12 serious injuries from his fall. FAC, pp. 3, 6-7.

13 Plaintiff seeks compensatory and punitive money damages, as well as any
14 declaratory or injunctive relief found to be appropriate. FAC, p. 4.¹

15 Motion for Summary Judgment

16 Defendant Brida moves for summary judgment on the ground that he was not
17 deliberately indifferent to plaintiff's health and safety and did not intentionally subject plaintiff to
18 any known risk of serious harm, contending that there is no triable issue of fact and that he is
19 entitled to judgment as a matter of law. Motion for Summary Judgment (MSJ), pp. 2. Further,
20 defendant claims entitlement to qualified immunity. MSJ, pp. 8-11.

21 Legal Standard for Summary Judgment

22 Summary judgment is appropriate when it is demonstrated that the standard set
23 forth in Fed. R. Civ. P. 56(c) is met. "The judgment sought shall be rendered forthwith if . . .
24 there is no genuine issue as to any material fact, and . . . the moving party is entitled to judgment

25 ¹ Plaintiff's allegations, with minor modification herein, were set forth in a previous
26 Order, filed on February 2, 2007, p. 2.

1 as a matter of law.” Fed. R. Civ. P. 56(c).

2 Under summary judgment practice, the moving party

3 always bears the initial responsibility of informing the district court
4 of the basis for its motion, and identifying those portions of “the
5 pleadings, depositions, answers to interrogatories, and admissions
6 on file, together with the affidavits, if any,” which it believes
7 demonstrate the absence of a genuine issue of material fact.

8 Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct., 2548, 2553 (1986). “[W]here the
9 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary
10 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers
11 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,
12 after adequate time for discovery and upon motion, against a party who fails to make a showing
13 sufficient to establish the existence of an element essential to that party’s case, and on which that
14 party will bear the burden of proof at trial. See id. at 322, 106 S. Ct. at 2552. “[A] complete
15 failure of proof concerning an essential element of the nonmoving party’s case necessarily
16 renders all other facts immaterial.” Id. In such a circumstance, summary judgment should be
17 granted, “so long as whatever is before the district court demonstrates that the standard for entry
18 of summary judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323, 106 S. Ct. at 2553.

19 If the moving party meets its initial responsibility, the burden then shifts to the
20 opposing party to establish that a genuine issue as to any material fact actually does exist. See
21 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356
22 (1986). In attempting to establish the existence of this factual dispute, the opposing party may
23 not rely upon the allegations or denials of its pleadings but is required to tender evidence of
24 specific facts in the form of affidavits, and/or admissible discovery material, in support of its
25 contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11,
26 106 S. Ct. at 1356 n. 11. The opposing party must demonstrate that the fact in contention is
material, i.e., a fact that might affect the outcome of the suit under the governing law, see
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); T.W. Elec.

1 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the
2 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the
3 nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

4 In the endeavor to establish the existence of a factual dispute, the opposing party
5 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
6 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
7 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
8 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
9 genuine need for trial.’” Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P.
10 56(e) advisory committee’s note on 1963 amendments).

11 In resolving the summary judgment motion, the court examines the pleadings,
12 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
13 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,
14 477 U.S. at 255, 106 S. Ct. at 2513. All reasonable inferences that may be drawn from the facts
15 placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S.
16 at 587, 106 S. Ct. at 1356. Nevertheless, inferences are not drawn out of the air, and it is the
17 opposing party’s obligation to produce a factual predicate from which the inference may be
18 drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
19 aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing
20 party “must do more than simply show that there is some metaphysical doubt as to the material
21 facts Where the record taken as a whole could not lead a rational trier of fact to find for the
22 nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587, 106 S.Ct.
23 1356 (citation omitted).

24 On April 11, 2005, the court advised plaintiff of the requirements for opposing a
25 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154
26 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klingele v.

1 Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

2 Undisputed and Disputed Facts

3 Defendant sets forth the following as undisputed facts (DUF), the first two of
4 which are not disputed by plaintiff. DUF 1. At all relevant times, defendant Brida was employed
5 as a Correctional Officer by the California Department of Corrections and Rehabilitation
6 (CDCR), California Medical Facility- Vacaville (CMF-Vac), assigned to the housing unit where
7 plaintiff was housed. (Declaration of Dave Brida (hereinafter "Brida Dec."), ¶ 2). DUF 2.
8 Defendant Brida's primary job duties consisted of maintaining order and security of the housing
9 unit. His duties also included the supervision of inmate porters who were assigned the job of
10 mopping the floors in the housing unit. (Defendant Brida's Dec., ¶ 3).

11 The facts plaintiff seeks to adamantly dispute are: DUF 3. Inmate porters are
12 trained to put up "caution" signs when mopping the floors. (Brida's Dec., ¶ 3). DUF 4. At no
13 time was defendant Brida aware of any dangerous condition of the floor that resulted in
14 plaintiff's slip and fall on April 14, 2004. (Brida's Dec., ¶ 4). DUF 5. At no time did defendant
15 Brida deliberately ignore the health and safety of plaintiff or other inmates. (Brida's Dec., ¶ 5).
16 DUF 6. At no time did defendant Brida ever intentionally or knowingly cause plaintiff to
17 experience any pain, injury or suffering. (Brida's Dec., ¶ 6).

18 Plaintiff does not set forth evidence in his opposition that actually disputes the
19 facts as expressed above, but simply states, in essence, that this defendant has never instructed
20 the porters to put out "caution" signs regarding wet floors, and that in failing to do so, he has
21 been deliberately indifferent to a substantial risk of injury to plaintiff. Opposition (Opp.), pp. 1-
22 5. In Reply, defendant avers that plaintiff has not submitted admissible evidence to refute the
23 defendant's undisputed statement of facts, but has merely relied on unauthenticated documents in
24 his opposition to support a claim that he has been injured, rather than meeting his burden of proof
25 to show defendant's "deliberate indifference." Reply, pp. 1-4.

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1 The court observes that notably absent from defendant's statement of undisputed
 2 facts is any affirmative statement that defendant took any steps whatever to ascertain that the
 3 porters, in fact, placed "caution" signs out when mopping floors in H2 wing, whether on April
 4 14, 2004, or on any date before or after the incident at issue, in the course of his supervisory
 5 duties. On the other hand, as to DUF 3, that the porters are trained to put out wet floor caution
 6 signs when mopping is not disputed by plaintiff when he simply alleges that defendant did not
 7 supervise them properly to make sure that they put out the signs.

8 *Eighth Amendment Legal Standard*

9 "Prison officials have a duty to ensure that prisoners are provided adequate
 10 shelter, food, clothing, sanitation, medical care, and personal safety." Johnson v. Lewis, 217
 11 F.3d 726, 731 (9th Cir. 2000), citing, inter alia, Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct.
 12 1970 (1994). When an inmate has been deprived of necessities, "the circumstances, nature and
 13 duration of a deprivation of these necessities must be considered in determining whether a
 14 constitutional violation has occurred." Johnson, supra, at 731.

15 The Ninth Circuit, in concluding that safety hazards, exacerbated by poor or
 16 inadequate lighting, pervaded a Washington penitentiary's occupational areas, "seriously
 17 threaten[ing] the safety and security of inmates and creat[ing] an unconstitutional infliction of
 18 pain," has stated:

19 Persons involuntarily confined by the state have a constitutional
 20 right to safe conditions of confinement. See Youngberg v. Romeo,
 21 1982, 457 U.S. 307, 315-16, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28;
 22 Santana v. Collazo, 1 Cir., 1983, 714 F.2d 1172, 1183. Not every
 23 deviation from ideally safe conditions amounts to a constitutional
 24 violation, see, e.g., Santana at 1183. However, the Eighth
 25 Amendment entitles inmates in a penal institution to an adequate
 26 level of personal safety. This is required because inmates, by
 reason of their confinement, cannot provide for their own safety.
Santana, supra, 714 F.2d at 1183. See also Estelle v. Gamble,
 1976, 429 U.S. 97, at 103-04, 97 S.Ct. 285, 290-91, 50 L.Ed.2d
 251.

Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985).

1 Prisoners alleging Eighth Amendment violations based on unsafe conditions must
2 demonstrate that prison officials were deliberately indifferent to their health or safety by
3 subjecting them to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. at 833, 114 S.
4 Ct. at 1977. “For a claim ... based on a failure to prevent harm, the inmate must show that he is
5 incarcerated under conditions posing a substantial risk of serious harm.” Id. at 834, 114 S. Ct. at
6 1977. The prisoner must also demonstrate that the defendant had a “sufficiently culpable state of
7 mind.” Id. This standard requires that the official be subjectively aware of the risk; it is not
8 enough that the official objectively should have recognized the danger but failed to do so. Id. at
9 838, 114 S. Ct. at 1979. “[T]he official must both be aware of facts from which the inference
10 could be drawn that a substantial risk of harm exists, and he must also draw the inference.” Id. at
11 837, 114 S. Ct. at 1979. “[A]n official’s failure to alleviate a significant risk that he should have
12 perceived but did not....” does not rise to the level of constitutionally deficient conduct. Id. at
13 838, 114 S. Ct. at 1979. “[I]t is enough that the official acted or failed to act despite his
14 knowledge of a substantial risk of serious harm.” Id. at 842, 114 S. Ct. at 1981. If the risk was
15 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at
16 1981. However, obviousness per se will not impart knowledge as a matter of law.

17 “[D]eliberate indifference entails something more than mere negligence...[but] is
18 satisfied by something less than acts or omissions for the very purpose of causing harm or with
19 knowledge that harm will result.” Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005),
20 quoting Farmer, supra, 511 U.S. at 835, 114 S. Ct. 1970. Prison officials display a deliberate
21 indifference to an inmate’s well-being when they consciously disregard an excessive risk of harm
22 to that inmate’s health or safety. Farmer, 511 U.S. at 837-838, 114 S. Ct. at 1979-80.

23 In Osolinski v. Kane, 92 F.3d 934 (9th Cir. 1996) a prisoner brought a § 1983
24 action claiming that the failure of prison officials to repair an oven, the door of which fell off and
25 burned his arm, violated the Eighth Amendment. In Osolinski, the Ninth Circuit found that it
26 was not clearly established that a single defective device, without any other conditions

1 contributing to the threat of an inmates' safety, created an objectively insufficiently inhumane
2 condition sufficient to be violative of the Eighth Amendment. 92 F.3d at 938. In reaching this
3 finding, the Ninth Circuit noted the following several cases which held that minor safety hazards
4 did not violate the Eighth Amendment. Id. In Tunstall v. Rowe, 478 F. Supp. 87, 89 (N.D.Ill.
5 1979), the existence of a greasy staircase which caused a prisoner to slip and fall and injure his
6 back did not state a constitutional claim under the Eighth Amendment because prison officials
7 are not under a constitutional duty to assure that prison stairs are not greasy. In Snyder v.
8 Blankenship, 473 F. Supp. 1208, 1212 (W.D.Va. 1979), the failure to repair a leaking dishwasher
9 which resulted in a pool of soapy water in which prisoner slipped, injuring his back, did not
10 violate the Eighth Amendment as "a slip and fall injury is not comparable to a prison-related
11 injury, such as harm caused by the assault of fellow inmates, for example." In Robinson v.
12 Cuyler, 511 F. Supp. 161, 163 (E.D.Pa. 1981), the court found that where a prisoner slipped on a
13 wet floor and was burned by the contents of an overturned pot an Eighth Amendment violation
14 was not stated as "[a] slippery kitchen floor does not inflict 'cruel and unusual punishments.'"
15 In Osolinski, 92 F.3d at 938-939, the Ninth Circuit also distinguished the facts of a Second
16 Circuit case, Gill v. Mooney, 824 F.2d 192, 195 (2d Cir. 1987), wherein plaintiff survived a
17 motion to dismiss on a claim of an Eighth Amendment violation, where plaintiff averred that
18 defendant had ordered him to continue working on a ladder after plaintiff had told defendant it
19 was unsafe, because "[t]he order to remain on the ladder in Gill exacerbated the inherent
20 dangerousness of the defective ladder, rendering the ladder a serious safety hazard, akin to those
21 found in Hoptowit."²

22 Furthermore, the Ninth Circuit has stated flatly that slippery prison floors do not
23 set forth a constitutional violation. Jackson v. State of Ariz., 885 F.2d 639, 641 (9th Cir. 1989)
24 (superseded on another ground) (inmate's complaint about slippery prison floors does not state
25

26 ² See Hoptowit v. Spellman, supra, 753 F.2d 779.

1 even an arguable Eighth Amendment violation), citing Rhodes v. Chapman, 452 U.S. 337, 349,
 2 101 S. Ct. 2392, 2400 (1981) (“the Constitution does not mandate comfortable prisons....”).

3 On the other hand, the Ninth Circuit has also found that slippery floors without
 4 protective measures could constitute a condition of deliberate indifference. Frost v. Agnos, 152
 5 F.3d 1124, 1129 (9th Cir. 1998), citing LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993)
 6 (inmates entitled to protection from unsafe prison conditions). In LeMaire, while the Ninth
 7 Circuit found that an injunction could be issued to protect inmates from unsafe conditions before
 8 a serious injury had occurred, the court nevertheless stated that “shackling a dangerous inmate in
 9 a shower” does not create a “sufficiently unsafe condition[,] [e]ven if the floors to the shower are
 10 slippery and LeMaire might fall while showering....” quoting Jackson, *supra*, 885 F.2d at 641
 11 (““slippery prison floors...do not state even an arguable claim for cruel and unusual
 12 punishment.””)

13 In Frost, by contrast, the inmate was disabled and on crutches, had fallen and
 14 injured himself several times on slippery shower floors; prison guards were aware of this and
 15 plaintiff had submitted several grievances to jail officials, advising them of the risk he faced. 152
 16 F.3d at 1129. Moreover, a prison doctor had stated that Frost should be placed in the
 17 handicapped unit, but prison officials had failed to accommodate him. *Id.*³

18 Discussion

19 Defendant concedes that the facts show negligence, but argues that his omissions
 20 do not rise to deliberate indifference, seeking to confine them to the specific date of the incident
 21 on which plaintiff suffered his injury. MSJ, p. 5-8.

22 In his amended complaint, plaintiff herein has made an effort to allege
 23 circumstances that are more like those of Frost, *supra*, than those of Osolinski, *supra*, LeMaire,

24
 25 ³ The legal standard applicable to plaintiff’s claim has previously been set forth by this
 26 court (in adjudicating defendant’s motion to dismiss) and is largely recapitulated here with
 appropriate modification and enhancement. See Order & Findings and Recommendations, filed
 on Jan. 31, 2006, pp. 5-7, adopted by Order, filed on March 17, 2006.

1 supra, or Jackson, supra. Plaintiff makes the blanket claim that defendant Brida failed to instruct
2 the porters to fulfill their assigned duties for the entire period of time that he was the assigned
3 wing officer in H2, and continued to fail to do so following plaintiff's slip and fall injury.
4 Defendant sets forth in DUF 2 that his duties include supervising inmate porters assigned the job
5 of mopping the floors in the housing unit and in DUF 3 that porters are trained to put out wet
6 floor caution signs. Although not explicitly set forth, it is a logical inference that though
7 defendant's duties included supervision of the porters, defendant was not the one who actually
8 instructed them with regard to putting out the caution signs for wet floors and may have never
9 done so; nor do defendant's undisputed facts make clear whether defendant has ever actually
10 monitored whether the inmate porters ever put wet floor caution signs out when mopping in the
11 wing at issue, notwithstanding his supervisory duties. It is a short leap to conclude that this
12 omission resulted in the porters' failure to use the caution signs when mopping and that
13 defendant Brida must have had some awareness of this. The question then arises whether such
14 conduct constitutes deliberate indifference to a substantial risk.

15 Defendant attempts to frame the claim as one where plaintiff merely alleges the
16 defendant failed to post a "caution" sign on a wet floor, in one instance, where plaintiff slipped
17 and fell. MSJ, p. 7. Defendant points out (MSJ, p. 9) that in Osolinski, wherein the denial of
18 summary judgment was reversed and qualified immunity granted, that three prior maintenance
19 requests for repair of the defective oven door therein at issue had been made prior to the
20 appellee's (plaintiff's) burn injury. 92 F.3d at 935. However, that court also noted that the
21 appellee had "not pled conditions which rendered him unable to 'provide for [his] own safety in
22 the sense that they precluded him from avoiding the faulty oven door or rendered him unable to
23 perceive its defective condition.'" Id., at 938. Defendant also argues that, unlike as in Frost,
24 plaintiff did not have a mobility impairment prior to his fall. MSJ, p. 10.

25 In opposition, plaintiff basically reiterates the allegations of his amended
26 complaint, emphasizing that defendant's "deliberate indifference," resulted in his serious injury,

1 submitting unauthenticated documents, which appear to be copies of plaintiff's medical records,
2 following the date of his slip and fall injury. Opp., pp. 1-20. He states that he has been
3 diagnosed by three prison doctors, Dr. Kofoed; Chief Medical Officer Dr. Bick; and Dr. Liou, all
4 of whom confirm the diagnosis of Dr. Shellcroft, an Orthopedic Surgeon. Opp., p. 1. Plaintiff
5 maintains that it is undisputed that he has had institutional chronos signed by doctors, as well as
6 daily physical therapy, and has used a "tens unit" with a battery charger for his neck. Id.

7 In a copy of a document, noted as an "Outpatient Health Record," copied to
8 plaintiff's central file, dated 5-12-04, apparently signed by Dr. Shellcroft, consulting Orthopedic
9 Surgeon and Dr. Bick, the following is stated:

10 Mr. Adams is suffering an apparent acute fracture and separation of
11 the coccygeal joint and severe arthritis of the spine. He is under
12 evaluation and has been referred to the orthopedic surgeon. He
requires an elevator pass and a cane to aid him with walking. The
chrono is valid for six months (through October 19, 2004).

13 Opp., p. 7.

14 Among the other exhibits is a copy of a trust account withdrawal order for a "Tens
15 Unit" and rechargeable battery in the amount of \$63.89. Opp., p. 8. A copy of a sheet of
16 "Physician's Progress Notes," has an entry, evidently dated 4/29/04, noting plaintiff's age as 65,
17 indicating that plaintiff "apparently slipped and fell in shower on 4/14/04 striking coccyx, low
18 back [] back of his head," and also evidently noting, inter alia, that plaintiff is an insulin-
19 dependent diabetic. Opp., p. 9. Plaintiff also includes what appears to be a copy of therapeutic
20 stretching exercises for the back and ankle, as well as copy of what looks like an order for
21 rehabilitation services, dated in 2005, and copies of a record of physical therapy treatments for
22 some periods of time in 2004 (after the date of his fall) and in 2005 and 2006, and a copy of a
23 document entitled "CMF Physical Therapy Evaluation," dated 5-9-05/12-19-05. Opp., pp. 10-19.
24 He also includes a copy of what appears to be a medical chrono, signed by Dr. John Wills and
25 Dr. Bick, CMO, dated 6/15/07, stating:

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1 Inmate has multiple medical problems, consisting mainly of
2 diabetes, cervical degenerative disease, diabetic nephropathy,
3 prostatic C.A. He requires a cane for ambulation, an elevator pass,
4 and low bunk housing. If low bunk is not available at this
institution, he may be transferred to a facility that can meet his
clinical needs. This chrono is valid for one year (through June 14,
2008).

5 Opp., p. 6.

6 Despite the lack of proper authentication of the records plaintiff has submitted to
7 which the defendant objects, and the lack of fully developed and supported allegations, the court
8 accepts that this pro se inmate plaintiff was 65 or thereabouts at the time of his fall, that he
9 suffered from certain medical conditions such as arthritis and diabetes at the time of his fall, that
10 he was seriously injured by the fall and that the fall was caused by floors that had just been
11 mopped but which had no caution signs to warn plaintiff of that fact. The court accepts, as well,
12 that the lack of cautionary wet floor signs was a routine occurrence on plaintiff's housing wing.
13 It is undisputed that it was defendant Brida's responsibility to supervise the porters who mopped
14 the floors in the area at issue, and it is undisputed that this defendant was at least negligent in
15 failing to have made sure that an appropriate caution sign was posted. It is an unresolved
16 question whether this defendant ever saw to it that there were warning signs posted for the wet
17 floors, before or after the injury-causing incident. Notwithstanding all of this, plaintiff neither
18 alleges or makes any showing of ever having filed a grievance about the condition of the floors
19 prior to having had his accident.⁴ Nor does he allege or submit any evidence of inmate
20 grievances about the failure to put up warning signs for wet floors having been filed and ignored.

21 The fact that defendant does not indicate by his statement of undisputed material
22 facts that he did or did not fail to caution porters himself about the need for warning signs, as
23

24 ⁴ The court even takes judicial notice of plaintiff's own motion for summary judgment
25 which was stricken as defective by the undersigned in the Order, filed on 2/2/07, wherein
26 plaintiff included a grievance, filed on 4/25/04, about slipping on the wet floor and injuring
himself and complaining about the lack of a caution sign. See docket entry # 21. This grievance
submitted by plaintiff occurred *after* the injury-causing incident.

1 noted, does lead the inference that he failed regularly, and certainly on the date of the incident at
2 issue, to do so. Nevertheless, under the circumstances as alleged, defendant is correct that
3 plaintiff simply has not supported a claim of defendant's deliberate indifference. To meet the
4 subjective prong of deliberate indifference, plaintiff must show more than that defendant should
5 have perceived the risk. "[A]n official's failure to alleviate a significant risk that he should have
6 perceived but did not...." does not rise to the level of constitutionally deficient conduct. Farmer
7 v. Brennan, supra, at 838, 114 S. Ct. at 1979. Nor does obviousness of the risk per se impart
8 knowledge as a matter of law. Moreover, as also noted earlier, the Ninth Circuit has stated
9 unequivocally that slippery prison floors do not set forth a constitutional violation. Jackson v.
10 State of Ariz., supra, 885 F.2d at 641. Plaintiff simply does not meet the burden that was met in
11 Frost, supra, 152 F.3d at 1129, to show that the defendant was aware of the risk by way of, for
12 example, previous falls or earlier grievances. Nor does he make clear that he himself was not
13 alert to what he claims to have been a pervasive risk of wet floors without caution signs such that
14 he would have taken extra care.

15 Because the court has found that the conduct alleged does not state a
16 constitutional deprivation to which he was subjected, the qualified immunity defense need not be
17 reached.

18 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion for
19 summary judgment, filed on July 20, 2007 (# 34) be granted and judgment entered for defendant.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen
22 days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
25 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 02/25/08

/s/ Gregory G. Hollows

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5 GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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